Supreme Court, U. S.
FILED
JAN 19 1977
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1976

**No. 76-636**

BUCKLEY TOWERS CONDOMINIUM, INC., a non profit Florida corporation, on behalf of itself and its stockholders and members,

*Petitioner,*

vs.

HERBERT BUCHWALD, individually and as trustee, and BUCKLEY DEVELOPMENT COMPANY, LTD.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF FOR RESPONDENTS IN OPPOSITION

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## BRIEF FOR RESPONDENTS IN OPPOSITION

## QUESTIONS PRESENTED

1. Whether the petitioner condominium association lacks standing to sue for treble damages pursuant to 15 U.S.C., Section 15, in a non-class action, on behalf of itself and on behalf of its members, when it affirmatively appears the association was not the victim of the alleged violations of the antitrust laws and incurred no injury or damage resulting therefrom.

2. Whether the petitioner condominium association lacks standing to sue for injunctive relief in a non-class action on behalf of itself and its members in the absence of any threatened loss or damage to the association from the alleged violations of the antitrust laws.

## STATEMENT

This private antitrust action was brought as a non-class action[1] by the petitioner condominium association "on behalf of itself and its stockholders and members." The petitioner (a non profit corporation) does not have stockholders. Its members consist of the record owners of condominium units in the Buckley Towers Condominium. The members of the association change from time to time as the condominium units are bought and sold. Upon the resale of a unit, the seller ceases to be a member of the association and is completely released from all obligations of a unit owner. The buyer, upon record transfer of title to the unit, becomes a new member of the association. Since the creation of the Buckley Towers Condominium on December 17, 1968, a substantial number of condominiums have been sold and resold resulting in constant changes of the petitioner's membership. The membership of the petitioner includes the respondent, Herbert Buchwald, who is the record owner of condominium units. The membership of the association, at any given time, consists of 569 individual unit owners. The member-

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1. The trial court found that:

"Although the Plaintiff purports to bring this action on behalf of its members and stockholders, the association has expressly disclaimed any intention to maintain the present action as a class action. Consequently, there is no need to determine whether the action meets the requirements of Fed. R. Civ. P. 23." 399 F. Supp. 38 (footnote)

This finding was based on plaintiff's representation to the trial court:

"[T]he Defendants mistakenly assume that this action is brought as a class action and this, of course is not the case. The Plaintiff brings the action as a party-plaintiff which has personally suffered damage as a result of a per se violation of the Sherman Act. . . . There is no reason to bring a class action in this case nor would a class action seem to be indicated upon the facts as alleged thus far." (R. 299-300)



ship is limited to the present owners of the condominium units. It does not include any of the innumerable former owners of units who have sold units, but who have the same alleged antitrust claim against respondents. The petitioner association does not purport to assert the antitrust claims of these former owners. A final adjudication of this action would not be binding on the former unit owners who are no longer members of the petitioner condominium association.

### Condominium Form of Ownership

The Florida Legislature authorized and accorded statutory recognition to the condominium form of ownership of real property. Chapter 711, Florida Statutes 1963, as amended (Condominium Act), prescribes the substantive legal requirements and governs the property interests, rights and obligations of the persons and entities involved in condominium form of ownership.

The property is subjected to condominium ownership by execution and recordation of Declaration of Condominium by the owner thereof setting out the matters required by the Condominium Act. (Section 711.08, Florida Statutes).

The condominium property consists of two categories (a) the privately owned units, and (b) the remaining condominium property (excluding the units) constituting the common elements, as described in the Declaration of Condominium. The units are owned in fee simple, and title thereto is conveyed by deed describing the particular unit by reference to the recorded Declaration of Condominium. The common elements are owned in common by the unit owners. They are appurtenant to and inseparable from the units, and cannot be conveyed separately from the units. The unit owners are required

to pay the cost of the operation, repair and maintenance of the common elements by periodic assessments. A unit cannot be acquired without inseparable pro-rata ownership of the common elements, and the mandatory obligation for payment of the common expenses for operation, repair and maintenance of the common elements. The common elements include the halls, elevators, lobby and all the condominium property, except the privately owned units. By operation of law, the sale and purchase of a condominium unit is conditioned on common ownership of the common elements and assumption of the obligation for payment of the common expenses. (Section 711.14, Florida Statutes). However, this is not the basis of the tie-in claim in this action.

The Condominium Act provides for a condominium association to be designated in the Declaration of Condominium. The association may be either a corporation for profit or a non profit corporation as prescribed by the Declaration. The current owners of the units, from time to time, constitute the members of the association. The association has no ownership interest in the condominium units or the common elements. It has no property interest in any of the condominium property. The sole responsibility and legal duty of the association is the maintenance of the common elements owned in common by the unit owners. The association assesses and collects from the unit owners periodic payments of the common expenses for maintenance of the common elements. The association has no property or funds of its own. It acts solely as a conduit in collecting the assessments from the unit owners and paying the common expenses from the funds received from the unit owners. The association is neither a purchaser of a unit nor the owner of a unit. It is unaffected by the obligation of a unit owner for payment of the common expenses.



The Condominium Act (Section 711.121) authorizes the association to lease recreation facilities for the enjoyment, recreation, use and benefit of the unit owners. The rental expense for the use of the leased recreation facilities by the unit owners constitutes common expenses paid by the unit owners. The association collects the prescribed rents from the unit owners as part of the common expenses and disburses them to the landlord. The association simply acts as a conduit in collecting the rent from the unit owners and paying it to the lessor. No funds of the association are involved. The common expenses collected from the unit owners include the maintenance of the common elements and the exclusive use of the leased recreation facilities by the unit owners. The recreation facilities provided for the exclusive use and benefit of the unit owners constitute an inseparable part of the condominium property in the same manner as the common elements, and the cost of the use thereof also constitutes a part of the common expenses. The unit owners are not precluded from acquiring the use of any other additional recreation facilities. They are free to utilize any recreation facilities of their own individual choice.

**The Buckley Towers Condominium**

The statutory authorization of the condominium form of ownership of real property resulted in myriad condominium developments, particularly in the South Florida area. A highly competitive market was created in condominium developments. Virtually all condominium projects of any size included leases of recreation facilities for the reason that recreation facilities were required by prospective purchasers and deemed necessary to meet competition existing in the comprehensive condominium market.

The Buckley Towers Condominium was created and came into existence by virtue of Declaration of Condominium recorded on December 17, 1968, in Official Record Book 6210, at Page 329 of the Public Records of Dade County, Florida. The Declaration of Condominium and attachments thereto, including survey plans of the condominium property, articles of incorporation and by-laws of the condominium association, description of the land, improvements and common elements, and the community facility lease (recreation facilities) were annexed as part of the complaint in this action. (R. 12-153). The condominium property consisted of two seventeen story buildings containing 564 apartment units, 5 shop units, and 23 recreation units. (Exhibit C to Declaration of Condominium).

Respondent, Buckley Development Company, Ltd., owned in fee all the property subjected to condominium ownership, as described in the Declaration of Condominium. The 23 recreation units described in the Declaration were owned in fee by the Respondent, Herbert Buchwald, Trustee. Simultaneously with the recordation of the Declaration of Condominium on December 17, 1968, Herbert Buchwald, Trustee, leased the 23 recreation units to the condominium association for the use and benefit of the unit owners. The Community Facility Lease (recreation facilities) was annexed to and made a part of the recorded Declaration of Condominium as Exhibit D. (R. 12-153). The Declaration expressly provides that the Buckley Towers Condominium was created subject to the Community Facility Lease made a part thereof, as authorized by the Condominium Act. (Section 711.121, Florida Statutes). Upon recordation of the Declaration of Condominium, Buckley Development Company, Ltd., became the sole owner of all the condominium property (units and common elements), subject to the Community Facility Lease of the recreation units owned by Herbert Buchwald,



Trustee. No other persons or entities were involved. All property rights were vested in the respondents.

The Declaration of Condominium and the Community Facility Lease provide that each unit owner is bound by the lease to the same extent and effect as if the unit owner had executed it. It is further provided that the expense of rental and other undertakings set forth in the lease constitute common expenses. The lease further provides that it shall be the duty of the condominium association to assess the unit owners in such amounts as shall be necessary to pay the rental obligations under the lease.

The respondent developer sold out the condominium units to individual buyers who assumed and agreed to be bound by (a) the community facility lease, (b) the obligation to pay the common expenses including the cost of maintenance of the common elements and the use of the leased recreation facilities, and (c) individual purchase money mortgage securing payment of balance due on the purchase price of the unit. Original purchasers have resold units under the same terms and conditions. Upon resale of a unit, the seller ceased to be a member of the association, and the seller was released from all obligations. The articles of incorporation of the condominium association provide:

> 3. QUALIFICATION OF MEMBERS AND MANNER OF THEIR ADMISSION. The members of this corporation shall constitute all record owners of the condominium parcels of the condominium. . . . The membership of the prior owner of such condominium parcel shall be thereby terminated. (Exhibit E to Declaration of Condominium. R. 12-153).

The condominium association did not purchase a condominium unit and never became a unit owner. The asso-

ciation is not a member of the class or group of the purchasers or owners of condominium units subjected to the alleged antitrust violations. The association was not the victim of the alleged antitrust violations. As a non unit owner, the association never assumed the obligations of a unit owner forming the basis of the alleged antitrust claims. The involvement of the association is merely as a conduit receiving and disbursing the rents paid by unit owners, which obligation to pay rent constitutes the alleged injury from the claimed antitrust violations. Petitioner does not purport to make any showing that the alleged antitrust violations resulted in any injury or damage to the association, or that it occupies the status of a purchaser or ultimate consumer at whom the alleged antitrust violations were directed.

**Settlement Agreement**

The condominium unit owners, as class plaintiffs, and the condominium association sued the respondents herein, as defendants, in the state court challenging the validity of provisions of the Declaration of Condominium. This consolidated litigation culminated in a comprehensive court approved settlement agreement between all the parties resolving all matters of controversy concerning the Buckley Towers Condominium. The settlement agreement provides, among other things, that the validity, enforceability and binding effect of the Declaration of Condominium and Community Facility Lease (recreation facilities) are ratified and confirmed by the unit owners, as class plaintiffs, and the condominium association and its members, and all claims arising therefrom are released (general release). (R. 242-270).

The parties fully performed the settlement agreement for some three years, until November 19, 1974, when the



unit owners and the condominium association repudiated the settlement agreement claiming illegality of the Community Facility Lease. Pursuant to supplementary proceedings, the court ordered that:

> 1. The settlement agreement made and entered into on April 8, 1971, . . . is valid and in full force and effect and binding in all respects on the parties executing the settlement agreement.
>
> 2. All parties, including plaintiff, Buckley Towers Condominium, Inc., and the condominium apartment unit owners and members of said condominium association, as class plaintiffs, are required to comply with, perform, abide by, and live up to the terms and conditions of said settlement agreement, including the Community Facility Lease made a part of the settlement agreement.

*See Buckley Towers Condominium, Inc.* v. *Buchwald*, 321 So.2d 628 (Fla. 3rd D.C.A. 1975), *appeal dismissed*, 327 So.2d 31 (Fla. 1976), *appeal dismissed*, 330 So.2d 15 (Fla. 1976).

**Subsequent Antitrust Action**

The condominium association then brought this private antitrust action, as a non-class action, on behalf of itself and its stockholders and members for alleged violations of Sections 1 and 2 of the Sherman Act. (15 U.S.C., Sections 1 and 2).

The first count of the complaint alleged the Declaration of Condominium and the Community Facility Lease constituted an illegal tying arrangement in that the purchasers of condominium units in Buckley Towers were required to accept and ratify the obligation to make rental payments for the use of the leased recreation facilities provided

for the use of the unit owners. The condominium association sought damages pursuant to Section 4 of the Clayton Act (15 U.S.C., Section 15) in treble the amount of all moneys paid by the unit owners under the Community Facility Lease since December 17, 1968.

In addition, although the complaint did not invoke jurisdiction under Section 16 of the Clayton Act (15 U.S.C., Section 26), the association sought (i) the cancellation and rescission of the lease, (ii) a permanent injunction restraining respondents from enforcing the terms of the lease, and (iii) the award to the association of title to the real property covered by the lease.

The second count of the complaint sought injunctive relief in the form of a stay by the federal court of the state court proceedings enforcing the court approved settlement agreement between the parties (*Buckley Towers Condominium, Inc.* v. *Buchwald, supra*), and requested federal court authorization to deposit all rental payments due under the lease in the registry of the court pending final determination of this action.

The respondents moved to dismiss on various grounds, including the following (R. 164-165):

> 5. To dismiss the action because the plaintiff lacks standing to sue under 15 U.S.C. Sec. 15 as a person injured in its business or property, in that, plaintiff is not shown to have purchased or acquired a condominium apartment unit (tying product) under the alleged illegal tying arrangement or paid any of its own funds as rents on the recreation lease (tied product).

Pursuant to evidentiary hearing set by court order (R. 228), the district court granted respondents' motion to dismiss the action for failure to state a claim upon



which relief can be granted on the ground that, since the condominium association never purchased a condominium unit, it lacked standing to complain of the alleged antitrust violations. *See Buckley Towers Condominium, Inc.* v. *Buchwald,* 399 F. Supp. 38 (S.D. Fla. 1975).

**Same Antitrust Action Refiled**

Upon dismissal of this action on July 31, 1975, the identical action was refiled on August 6, 1975, as a class action, by the condominium association "individually and on behalf of its membership" and by a unit owner (Ignatz Spitz) "individually and on behalf of all residential unit owners at the Buckley Towers Condominium." (R. 321-334). The complaint alleges that the action is refiled "pursuant to the mandate as set forth in the Order of Dismissal bearing date 31 July 1975." (R. 324).

The same question of the standing of the condominium association is presented in the refiled action. The standing question has been briefed and argued to the Fifth Circuit Court of Appeals on appeal taken from Order of Dismissal of the refiled action. The Court of Appeals is urged to reconsider its decision which is the subject of this certiorari proceeding. (Court of Appeals Case No. 76-1848, argued December 16, 1976). The pending appeal also involves the question whether the alleged antitrust claim is barred under the limitations statute. The district court held that it was.

**Decision of Court of Appeals**

On the basis of the undisputed facts shown by the record, the court of appeals affirmed the decision of the district court. *See Buckley Towers Condominium, Inc.* v. *Buchwald,* 533 F.2d 934 (5 Cir. 1976).

As the court pointed out, the gravamen of the condominium association's antitrust claim is that the Declaration of Condominium and Community Facility Lease recorded on December 17, 1968, governing the Buckley Towers Condominium, created a tying arrangement in violation of Section 1 of the Sherman Act. The association asserts that under the condominium documents the purchaser of a condominium unit is required to accept, ratify and be bound by the terms of the lease, and the obligation to pay the rent prescribed by the lease for the use of the leased recreation facilities. The alleged tied product is the recreation facilities and the obligation to pay for the use thereof, and the tying product is the condominium units. The sale of condominium units is conditioned upon acceptance of and payment for the use of the leased recreation facilities. The obligation to pay for use of the leased recreation facilities is tied to the purchase of a condominium unit. However, there is no requirement that the unit owners utilize only the leased recreation facilities in the Buckley Towers Condominium. The unit owners are perfectly free to acquire or use any other recreation facilities.

The condominium association has never purchased a condominium unit nor become a unit owner. The association is not a purchaser of the tying product nor an ultimate consumer affected by the alleged tying arrangement. The use of the leased recreation facilities is limited to unit owners. Only unit owners have the obligation to pay rent for the use of the leased recreation facilities. The association does not pay the rent for use of the leased recreation facilities. The association merely assesses and collects the rents prescribed by the lease from the unit owners and transmits the funds paid by the unit owners to the landlord. The association is not in anywise involved in the alleged tying arrangement either as a purchaser



of the tying product or as a consumer of the tied product. It serves only as a conduit in collecting the common expenses from the unit owners and paying therefrom the rental for the use of the leased recreation facilities by the unit owners.

Given these factual circumstances, the court of appeals relied on the cited authorities as the basis for its decision that the district court correctly determined the condominium association lacked standing to maintain this action.[2]

The court of appeals stated the standard applied to the facts in this case as follows: (533 F.2d at 935).

> [I]n order to have standing to maintain an action for treble damages under Section 4 of the Clayton Act a plaintiff must satisfy two criteria: (1) the plaintiff must demonstrate an injury to its "business or property", and (2) the plaintiff must show that this injury was the result of the defendant's illegal activities. . . .

With respect to the association's claim for injunctive relief, the court stated that, leaving aside the alleged damage to the unit owners, the association has not alleged, and the court is unable to apprehend, any threatened damage cognizable in equity proximately resulting from the alleged antitrust violation sufficient to confer standing upon the association, even under the more liberal standards of Section 16 of the Clayton Act. (533 F.2d 938).

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2. *Battle* v. *Liberty National Life Insurance Company*, 5 Cir. 1974, 493 F.2d 39, *cert. denied* 1975, 419 U.S. 1110, 95 S. Ct. 784, 42 L. Ed. 2d 807; *Hawaii* v. *Standard Oil Company of California*, 1972. 405 U.S. 251, 92 S. Ct. 885, 31 L. Ed. 2d 184; *Dailey* v. *Quality School Plan, Inc.*, 5 Cir. 1967, 380 F.2d 484; *Martin* v. *Phillips Petroleum Company*, 5 Cir. 1966, 365 F.2d 629, *cert. denied* 385 U.S. 991, 87 S. Ct. 600, 17 L. Ed. 2d 451.

The court then considered the injunction claim in the light of the decision in *Warth* v. *Seldin*, 1975, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343. The court recognized the rule that, even in the absence of injury to itself, an association may have standing solely as the representative of its members, where its members are suffering immediate or threatened injury. However, the court relied on the limitation that the association must show that:

> [T]he nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, . . . (533 F.2d at 938).

## ARGUMENT

### I

**The petitioner condominium association lacks standing to sue for treble damages pursuant to 15 U.S.C., Section 15, in a non-class action, on behalf of itself and on behalf of its members, when it affirmatively appears the association was not the victim of the alleged violations of the antitrust laws and incurred no injury or damage resulting therefrom.**

It has been observed that the Supreme Court has not passed directly on the standing requirement in treble-damage cases. *State of Illinois* v. *Ambress Brick Company, Inc.*, 536 F.2d 1163 (7 Cir. 1976); ABA Antitrust Section, *Antitrust Law Developments*, 1973, at 257. But the court has not expressly overturned decisions to the effect that in order to establish "standing" the plaintiff must show an injury in fact that is "arguably within the zone of interests to be regulated by the statute." *Mulvey* v. *Samuel Goldwyn Productions*, 433 F.2d 1073 (9 Cir. 1970), *cert.*



*denied* 402 U.S. 923; *Calderone Enterprises Corporation* v. *United Artists Theatre Circuit*, 454 F.2d 1292 (2 Cir. 1971), *cert. denied* 406 U.S. 930. Despite extensive litigation of the standing issue in lower courts, the Supreme Court has offered surprisingly little guidance on the standing question. *Tugboat, Inc.* v. *Mobile Towing Co.*, 534 F.2d 1172, 1174 (5 Cir. 1976).

The Fifth Circuit, in *Battle* v. *Liberty National Life Insurance Company*, 493 F.2d 39, 49 (5 Cir. 1974), stated:

> In this circuit the limitation of this principle has been stated as requiring the plaintiff to show that he is "within the sector of the economy in which the violation threatened a breakdown of competitive conditions and that he was proximately injured thereby." . . .
>
> And in *Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129, 1131 (5 Cir. 1975), the Fifth Circuit stated:
>
> > To attain standing a person (whether corporation or individual) must be one against whom the conspiracy is aimed. Or, put in plutonomic terms, the complainant must show that he is within that sector of the economy which is endangered by a breakdown of competitive conditions in a particular industry. (Citations omitted).

The decision in the instant case applies the "zone of interest" test of standing to the facts reflected by the record. It is submitted that the facts in this case demonstrate the lack of standing of the condominium association to sue for the recovery of treble damages in its own right under any concept of justiciability.

The doctrine of standing poses the question whether a particular person is a proper party to litigate a given issue. The clear requirement of Section 4 of the Clayton

Act is that plaintiff must have suffered injury at the hands of the defendants before he can bring an action. This prerequisite both defines the real party in interest and satisifes the minimum criterion of justiciability established by Article III of the Constitution. *Malamud* v. *Sinclair Oil Corporation*, 521 F.2d 1142, 1149 (6 Cir. 1975).

In *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Company*, 334 U.S. 219, 68 S. Ct. 996, 92 L. Ed. 1328, the court observed that:

> The (Sherman) Act is comprehensive in its terms and coverage, protecting all who are made *victims* of the forbidden practices by whomever they may be perpetrated. . . . (Emphasis supplied).

And the decision in *Radovich* v. *National Football League*, 352 U.S. 445, 1 L. Ed. 2d 456, 77 S. Ct. 390, states:

> Petitioner's claim need only be "tested under the Sherman Act's general prohibition on unreasonable restraints of trade," (citation omitted), and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the *victims* of the forbidden practices as well as the public. (Citation omitted) (Emphasis supplied).

The decision in *Data Processing Service* v. *Camp*, 397 U.S. 150, 25 L. Ed. 2d 184, 90 S. Ct. 827, warns that:

> Generalizations about standing to sue are largely worthless as such . . .



and then delineates the threshold question as follows:

> The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise. . . .

*Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 31 L. Ed. 2d 184, 92 S. Ct. 885 (1972), concludes that the injury to "business or property" requirements of Section 4 of the Clayton Act refer to "commercial interests or enterprises." It is further indicated that recovery in damages is authorized only for those injuries suffered to business or property in the capacity of a consumer of goods and services.

In the instant case, it is alleged that the condominium documents annexed to the complaint constitute the alleged tie-in violation of the Sherman Act. It affirmatively appears on the face of the condominium documents that the petitioner condominium association is not the "victim" of the alleged tying arrangement, and suffered no injury to its business or property by reason of the alleged antitrust violation. The association was not a purchaser of the alleged tying product, nor a user or ultimate consumer of the alleged tied product. The association is not arguably within the zone of interests to be regulated by the statute.

II

**The petitioner condominium association lacks standing to sue for injunctive relief in a non-class action on behalf of itself and its members in the absence of any threatened loss or damage to the association from the alleged violations of the antitrust laws.**

The complaint in this action does not purport to invoke jurisdiction under Section 16 of the Clayton Act, 15 U.S.C., Section 26. There is no showing of any "threatened in-

jury." The condominium documents annexed to the complaint demonstrate the absence of possibility of any "threatened injury" to the association.

The Court of Appeals found that:

> Similarly lacking in merit is the appellant's fallback assertion that it had standing to maintain on behalf of itself and its members an action for injunctive relief under Section 16 of the Clayton Act. Title 15, U.S.C., Section 26. Although Section 16 is broader than Section 4 in that it does not require an injury to "business or property", in order to achieve standing under Section 16 a plaintiff must demonstrate a loss or injury cognizable in equity proximately resulting from the alleged antitrust violation. (Citations omitted). Leaving aside the alleged damage to the residential condominium unit owners the appellant-association has not alleged and we do not apprehend any damage cognizable in law or equity sufficient to confer standing to sue upon Buckley even under the eased requirements of Section 16. (533 F.2d at 938).

Section 16 of the Clayton Act involves traditional principles of equity and authorizes injunctive relief upon the demonstration of "threatened injury." It is not necessary to show actual injury, but there must be a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 23 L. Ed. 2d 129, 89 S. Ct. 1562.

The Fifth Circuit has consistently determined standing to sue for injunctive relief pursuant to Section 16 of the Clayton Act in accord with the *Zenith* decision, *supra*. *See Credit Bureau Reports, Inc.* v. *Retail Credit Company,*



476 F.2d 989 (5 Cir. 1973); *Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129 (5 Cir. 1975); and *Tugboat, Inc.* v. *Mobile Towing Co.*, 534 F.2d 1172 (5 Cir. 1976).

**Standing of Association to Sue on Behalf of Members**

Since the record clearly demonstrates that the condominium association lacks standing to sue in its own behalf for the alleged antitrust violations, the question remains as to its standing to sue, in a non-class action, on behalf of its members, the present condominium unit owners, including the respondent, Herbert Buchwald.

The association brought this action on behalf of, and against, the respondent member of the association without his knowledge, consent or authorization, and against his will. It is not known whether there may be other unwilling members on whose behalf the association purports to sue. There are 569 members of the association, 564 apartment unit owners and 5 shop unit owners. There is no showing that the members authorized or consented to the association bringing this action on their behalf, despite the opportunity afforded at the evidentiary hearing before the district court. This non-class action does not accord to the members the benefit of the Rule 23 notice requirements afforded by a class action nor the opportunity to request exclusion from the class prescribed by the Rule.

Since the members of the association consist solely of the current unit owners, this action does not include the antitrust claims of any of those individuals who purchased units during the period from December 17, 1968, and sold their units and thereupon ceased to be members of the association. The respondent developer, Buckley Development Company, Ltd., sold out all the condominium units to original purchasers on April 8, 1971, and has not since then participated or engaged in the alleged tying arrangement

complained of in this action. The respondent developer was not involved in the resale of the condominium units by the original purchasers. Upon the creation of the Buckley Towers Condominium on December 17, 1968, the respondent developer was the record owner of all 569 of the condominium units and, therefore, the sole member of the association and the only victim of the alleged tying arrangement. The respondent developer ceased to be a member of the association on April 8, 1971, when it sold the last unit.

Under the circumstances, it is uncertain as to what claimants and interests might be bound by a final adjudication in this non-class action, and as to the extent that respondents would be subjected to liability for the same antitrust claims.

The mootness of the standing issue in this case is suggested by reason of the pending class action brought by a unit owner on behalf of all other unit owners and by the condominium association on behalf of itself and on behalf of its members alleging the same antitrust claim against the respondents herein. (R. 321-334).

The Court of Appeals in the instant action, cited and recognized that *Warth* v. *Seldin*, 422 U.S. 490, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975), holds that:

> There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association may enjoy. Moreover, in attempting to secure relief from injury to itself the association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties. . . .



> Even in the absence of injury to itself, an association may have standing solely as the representative of its members. . . . The association must allege that its members, or any of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. . . .

The Court of Appeals relied on and applied the limiting statement in *Warth, supra,* that:

> So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

The conclusion is inescapable that in the instant case the nature of the claim and the relief sought makes the individual participation of all the class of unit owners, as the injured parties, indispensable to the proper resolution of the cause. The mere convenience of the association should not be accommodated to the detriment of the rights of the respondents. In this case, the class action suit commenced by the unit owners better serves the interests of all the affected persons.

Citing *Warth* v. *Seldin, supra,* the decision in *Simon* v. *Eastern Kentucky Welfare Rights Organization,* ..... U.S. ....., 48 L. Ed. 2d 450, at 461, states:

> Since they (five organizations) allege no injury to themselves as organizations, and indeed could not in the context of this suit, they can establish standing only as representatives of those of their members who have been injured in fact, and thus could have brought suit in their own right. . . .

Notwithstanding as a general principle an association may sue on behalf of its members in the absence of injury to itself, the standing to bring a private antitrust action for treble damages is governed by the requirements of Section 4 of the Clayton Act, 15 U.S.C., Section 15. This controlling statute expressly confers standing solely on "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." The language of the statute places a limitation on standing to bring this private antitrust action.

**Summary**

Petitioner lacks standing to sue on behalf of itself and its members under Section 4 and Section 16 of the Clayton Act, 15 U.S.C., Sections 15 and 26. The condominium association has never purchased the alleged tying product, a condominium unit, nor has it been the ultimate consumer of or made payment for the recreation facilities, the alleged tied product. In no way has the condominium association been affected by the alleged tying arrangement. Accordingly, the association has not suffered and cannot be threatened with injury so as to invoke jurisdiction on behalf of itself under Sections 4 and 16 of the Clayton Act.

The issue of whether the association has standing to sue on behalf of its members in the absence of injury to itself is now moot by reason of the pending class action commenced by a unit owner on behalf of all other unit owners and by the condominium association on behalf of itself and on behalf of its members alleging the same antitrust claim against respondents herein. Moreover, Section 4 of the Clayton Act, the statutory provision on which petitioner's claim rests, cannot properly be understood as granting an association standing to sue on behalf of its



members in the absence of injury to itself. This governing statute provides standing to sue solely to a person who shall be *injured* in *his* business or property.

## CONCLUSION

The petition for a writ of certiorari to review the Fifth Circuit's decision in *Buckley Towers Condominium, Inc.* v. *Buchwald*, 533 F.2d 934 (5 Cir. 1976), on alleged ground of conflict, should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief of Respondents in Opposition have been furnished to JOSEPH S. PAGLINO, Esquire, 88 N. E. 79th Street, Miami, Florida 33138, Attorney for Petitioner, by mail, in accordance with Rule 33, this 18th day of January, 1977.

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